LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 27 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 999

CARL REYNOLDS SHELTON,

Petitioner,

—v.—

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MELVIN L. WULF
JOEL M. GORA
156 Fifth Avenue
New York, N. Y.

DAVID L. STERLING
1404 First National Bank Building
Cincinnati, Ohio

Attorneys for Petitioner

TABLE OF CONTENTS

	PAGE
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The petitioner was deprived of his right to effective representation in violation of the Sixth and Fourteenth Amendments by the failure of his court-appointed attorney to request that a stenographer be present to record the proceedings at trial	7
II. The petitioner was deprived of his right to effective representation in violation of the Sixth and Fourteenth Amendments by the failure of his court-appointed attorney to inform him of his right to assigned counsel for purposes of appeal as of right	11
III. The petitioner was deprived of his right to effective representation in violation of the Sixth and Fourteenth Amendments by the combination of the failure of his court-appointed attorney to request that a stenog-	

PAGE

rapher be present to record the proceedings at trial, and the failure of said attorney to inform him of his right to assigned counsel for purposes of appeal as of right 13

CONCLUSION:

For the reasons set forth above, certiorari should be granted 15

APPENDIX:

Finding of Fact and Conclusions of Law of the Court of Common Pleas, Hamilton County, Ohio .. 17

Order of the First District Court of Appeals 19

Judgment of the Supreme Court of Ohio 21

TABLE OF AUTHORITIES

CASES:

Anders v. *California*, 386 U.S. 738 (1967) 9
Avery v. *Alabama*, 308 U.S. 444 (1940) 8

Carden v. *Henderson*, 284 F. Supp. 1009 (E.D. Tenn. 1967) 9
Coles v. *Peyton*, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1969) 8
Cross v. *United States*, 392 F.2d 360 (8th Cir. 1968) 8

Davis v. *Wilson*, 278 F. Supp. 852 (C.D. Cal. 1968) 8
Douglas v. *California*, 372 U.S. 353 (1963) 8, 11, 12

Entsminger v. *Iowa*, 386 U.S. 748 (1967) 9, 10

PAGE

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 8

Hawk v. *Olsen*, 326 U.S. 271 (1945) 8
Hayes v. *Russell*, 405 F.2d 859 (6th Cir. 1969) 8
Hillman v. *State*, 234 Ind. 27, 123 N.E.2d 180 (1954) 9

Kruchten v. *Eyman*, 406 F.2d 304 (9th Cir. 1969) 8

Lane v. *Brown*, 372 U.S. 477 (1963) 9

Matherne v. *United States*, 391 F.2d 449 (5th Cir. 1968) 9

Nelson v. *Peyton*, 415 F.2d 1154 (4th Cir. 1969) 12

Powell v. *Alabama*, 287 U.S. 45 (1932) 7, 8

Schwander v. *United States*, 386 F.2d 20 (5th Cir. 1967) 9
Smotherman v. *Beto*, 276 F. Supp. 579 (N.D. Tex. 1967) 9
Spotswood v. *Industrial Commission*, 17 Ohio L. Abs. 196 (Ct. App. 1934) 14
State v. *Catlino*, 10 Ohio St.2d 183 (1967) 14
State v. *Ratliff*, 20 Ohio App.2d 20 (1969) 10
Swenson v. *Bosler*, 386 U.S. 258 (1967) 11

United States v. *Currier*, 405 F.2d 1039 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969) 8
United States ex rel. Carey v. *Rundle*, 409 F.2d 1210 (3rd Cir. 1969) 8
United States ex rel. Maselli v. *Reincke*, 383 F.2d 129 (2d Cir. 1967) 8
United States ex rel. Smith v. *McMann*, —— F.2d —— (1969) (en banc) 12

PAGE

Victor v. *Lane*, 394 F.2d 268 (7th Cir. 1968) 13

Wainwright v. *Simpson*, 360 F.2d 307 (5th Cir. 1966) .. 8
Williams v. *Kaiser*, 323 U.S. 471 (1944) 8
Worts v. *Dutton*, 395 F.2d 341 (5th Cir. 1968) 13
Wynn v. *Page*, 369 F.2d 930 (10th Cir. 1966) 8

Constitutional Provisions:

UNITED STATES CONSTITUTION

Sixth Amendment 2, 4, 7, 11, 13

Fourteenth Amendment 2, 4, 7, 9, 11, 13

Federal Statute:

28 U.S.C. §1257(3) 2

State Statutes:

Section 2053.21 Ohio Revised Code 4

Section 2953.05 Ohio Revised Code 2, 4, 11, 14

Other Authority:

Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434 (1965) 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

CARL REYNOLDS SHELTON,

Petitioner,

—v.—

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above-entitled case on October 13, 1969.

Citations to Opinion Below

The Finding of Fact and Conclusions of Law of the Court of Common Pleas, Hamilton County, Ohio, made on June 26, 1968, is unreported. It is contained in the record, and is printed in the Appendix, *infra,* pp. 17-18. The order of the First District Court of Appeals appears in the Appendix, *infra,* pp. 19-20. The judgment of the Supreme Court of Ohio is reported at 42 Ohio Bar 1233 (1969) and is set forth in the Appendix, *infra,* pp. 21-22.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on October 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Questions Presented

1. Whether the failure of petitioner's court-appointed attorney to request that a stenographer be present to record the trial proceedings violates the Sixth Amendment and the Fourteenth Amendment?

2. Whether the failure of petitioner's court-appointed attorney to inform him of his right to court-assigned counsel to prosecute his appeal as of right violates the Sixth Amendment and the Fourteenth Amendment?

3. Whether the combination of the failure of petitioner's court-appointed attorney to request the presence of a stenographer and to inform petitioner of his right of counsel for purposes of appeal as of right violates the Sixth Amendment and the Fourteenth Amendment?

Statute Involved

Section 2953.05, Ohio Revised Code:

> Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after judgment and sentence or from an order overruling a motion for a new trial or an order placing the defendant on probation and suspending the imposition of

sentence in felony cases, whichever is the later. Appeals from judgments or final orders as above defined in magistrate courts shall be taken within ten days of such judgment or final order. After the expiration of the thirty day period or ten day period as above provided, such appeal may be taken only by leave of court to which the appeal is taken. An appeal may be taken to the supreme court by giving notice as provided by law and rule of such court thirty days from the journalization of a judgment or final order of the court of appeals in all cases as provided by law.

Statement of the Case

The petitioner was indicted by the Hamilton County, Ohio grand jury on March 29, 1963 for the crime of auto-stealing; five days later on April 2, 1963 the Court of Common Pleas of Hamilton County, Ohio appointed Owen K. Blythe as the petitioner's attorney. (Finding of Fact; Affidavit of Owen K. Blythe.)[1] Petitioner's case went to trial on May 10, 1963. (Finding of Fact.) The petitioner was taken from the Cincinnati, Ohio Workhouse, brought to the courtroom of Common Pleas Judge Hoy and then transferred to that of the late Common Pleas Judge Bader. His attorney, Owen K. Blythe, made no request that a stenographer be present to record the proceedings; there is, therefore, no transcript of the trial. (Stipulation of Facts.)[2] Nothing of what occurred is known other than the facts that the petitioner signed a waiver of a jury trial, that he

[1] The Affidavit is contained in the Record filed with this Court.

[2] The Stipulation of Facts is contained in the Record filed with this Court.

was convicted of the offense of auto-stealing, and that he was sentenced to an indeterminate term in the Ohio Reformatory. After the trial the petitioner's court-assigned counsel made no attempt to contact him either by letter or by personal interview, and as a result petitioner was not informed of his right to a court-appointed attorney for purposes of appeal as of right under Section 2953.05 of the Ohio Revised Code. (Affidavit of Owen K. Blythe; Hearing on Petition to Vacate, 8-9.)[3]

In September, 1966 the petitioner filed on his own behalf and without benefit of counsel a petition to vacate judgment pursuant to Section 2053.21 of the Ohio Revised Code in the Common Pleas Court of Hamilton County, Ohio alleging among other things that he was denied counsel in violation of the Sixth and Fourteenth Amendments to the Federal Constitution. (Finding of Fact.) Without an evidentiary hearing this petition was denied on September 28, 1966, and the First District Court of Appeals of Ohio on January 19, 1967 denied the petitioner leave to appeal from the dismissal of the petition to vacate judgment. (Finding of Fact.)

[illegible], while represented by counsel, filed a petition to vacate judgment in the Hamilton County, Ohio Common Pleas Court in which he alleged that he was denied effective representation in violation of the Sixth and Fourteenth Amendments to the Federal Constitution. (Petition to Vacate.)[4]

---

[3] A copy of the minutes of the December 28, 1967 hearing on the petition to vacate has been filed with this Court.

[4] The Petition to Vacate is contained in the Record filed with this

A hearing on this petition was held before Common Pleas Judge Raymond Shannon on December 28, 1967 at which time the petitioner testified to the lack of effective representation by his court-appointed attorney at the original trial. In his testimony, which went uncontradicted, petitioner indicated that prior to the trial he saw his assigned attorney on only one occasion and for a period of less than ten minutes. (Hearing Minutes 6-7.) Petitioner mentioned two alibi witnesses, but apparently counsel did not investigate further. (Hearing Minutes 5-7.) After the trial, he never saw or heard from counsel again, nor did counsel ever inform petitioner of his right to appeal the conviction or to have an attorney for appeal. (Hearing Minutes 7-9.) Mr. Blythe had earlier submitted an affidavit, in connection with the petition to vacate, stating that he "did not recall having informed said petitioner of his right to a court-appointed attorney for purposes of prosecuting an appeal as of right . . . . [and] that he does not recall that said court informed said petitioner of his right to a court-appointed attorney for purposes of prosecuting an appeal as of right." (Affidavit of Owen K. Blythe.) Mr. Blythe, who had been subpoenaed, failed to make an appearance because of ill health. Subsequently on January 8, 1968, counsel for the petitioner and for the State of Ohio visited Mr. Blythe at his home, discussed the case with him and agreed to a stipulation of fact. During the interview Mr. Blythe averred among other things that it was his practice to request that a stenographer be present to record the proceedings only when he thought "he had a good chance of winning a case," and that he made no such request for a stenographer to record the proceedings at petitioner's trial. (Stipulation of Facts.)

The Court of Common Pleas, Hamilton County, Ohio made finding of fact and conclusions of law on June 26, 1968 denying the petition to vacate judgment. (See Appendix, *infra,* p. 17.) Petitioner's counsel then filed a Motion to Enlarge the Finding of Fact which was subsequently overruled, and a timely notice of appeal was filed with the First District Court of Appeals of Ohio. On August 19, 1968 petitioner filed his brief; a hearing on the appeal was held on March 20, 1969; and on April 7th, the Court of Appeals affirmed the judgment of the Hamilton County Court of Common Pleas. On May 2, a timely notice of appeal was filed in the First District Court of Appeals, and a timely notice of appeal along with a Memorandum in Support of Jurisdiction was filed with the Supreme Court of Ohio. The petitioner argued his appeal before a master commissioner of the Ohio Supreme Court on July 7, 1969, and on October 1, 1969 the Supreme Court of Ohio dismissed the appeal for the reason that "no substantial constitutional question exists herein." The mandate of the Ohio Supreme Court was entered on October 13, 1969.

The questions presented herein were raised throughout the proceedings in the courts of Ohio by advancing them in the initial petition to vacate the conviction, the appeal to the First District Court of Appeals, and the memorandum in support of jurisdiction filed in the Supreme Court of Ohio.

Reasons for Granting the Writ

This case involves substantial constitutional issues concerning the responsibility of an appointed attorney to safeguard his indigent client's right to an effective appeal. These issues are presented from two perspectives. First, whether an appointed attorney who unilaterally prevents his client from obtaining the necessary tools for appellate review of his conviction has provided the effective assistance of counsel to which petitioner is constitutionally entitled. Second, how can this Court best insure that the constitutionally mandated right to counsel on appeal will be afforded to *all* indigent defendants.

With regard to the first issue, the ruling below is in conflict with the applicable decisions of this Court concerning the responsibility of counsel. As to the second question, petitioner submits that the best way to implement the indigent's right to appeal, recognized in a number of this Court's rulings, is to inform him of that right.

I.

The petitioner was deprived of his right to effective representation in violation of the Sixth and Fourteenth Amendments by the failure of his court-appointed attorney to request that a stenographer be present to record the proceedings at trial.

In *Powell* v. *Alabama,* 287 U.S. 45 (1932), this Court ruled for the first time that the due process clause of the Fourteenth Amendment required not only the assignment of counsel in a capital case, but also that the appointed attorney defend his client effectively. The vital importance, even to the educated layman, of "the guiding hand

of counsel at every step in the proceedings against him," *id.* at 69, has been frequently recognized since then. See, *e.g., Avery* v. *Alabama,* 308 U.S. 444 (1940); *Williams* v. *Kaiser,* 323 U.S. 471 (1944); *Hawk* v. *Olsen,* 326 U.S. 271, 274 (1945).

While this Court has now fully established the right to counsel in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) and *Douglas* v. *California,* 372 U.S. 353 (1963) requiring counsel at trial and on appeal, it has not since *Powell* enlarged upon the criteria by which the effectiveness of counsel's representation must be judged. See Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434 (1965). It has, however, indicated that the constitutional guarantee of assistance of counsel "cannot be satisfied by mere formal appointment," *Avery* v. *Alabama, supra,* at 446, and accordingly the lower courts have inquired into the effectiveness of representation.[5]

---

[5] In most cases, the issue relates to counsel's preparation for and conduct of a trial. The prevalent standard for judging the effectiveness of representation is whether counsel's conduct rendered the proceeding a "farce and a mockery of justice," see, *e.g., Kruchten* v. *Eyman,* 406 F.2d 304 (9th Cir. 1969); *Cross* v. *United States,* 392 F.2d 360 (8th Cir. 1968); *United States* v. *Currier,* 405 F.2d 1039 (2d Cir.) *cert. denied,* 395 U.S. 914 (1969); *United States ex rel. Carey* v. *Rundle,* 409 F.2d 1210 (3rd Cir. 1969); *Hayes* v. *Russell,* 405 F.2d 859 (6th Cir. 1969), although certain decisions have held counsel to a more demanding standard, see, *e.g., Coles* v. *Peyton,* 389 F.2d 224 (4th Cir. 1968), *cert. denied,* 393 U.S. 849 (1969). But increasingly courts have also inquired as to whether the attorney has rendered constitutionally effective assistance in preserving his client's right to appeal. Although no clear criterion has emerged by which to judge counsel's conduct in this regard, see *United States ex rel. Maselli* v. *Reincke,* 383 F.2d 129 (2d Cir. 1967), the courts have frequently held that the failure to preserve the right to appeal, though requested to do so, constitutes ineffective assistance of counsel. See, *e.g., Wainwright* v. *Simpson,* 360 F.2d 307 (5th Cir. 1966); *Wynn* v. *Page,* 369 F.2d 930 (10th Cir. 1966); *Schwander* v. *United States,* 386 F.2d 20 (5th Cir. 1967); *Davis* v. *Wilson,* 278 F. Supp. 852 (C.D. Cal.

Moreover, this Court has consistently condemned procedures by which counsel could truncate or completely deny the effective appeal to which the indigent accused is constitutionally entitled. See, *e.g.*, *Lane* v. *Brown*, 372 U.S. 477 (1963); *Anders* v. *California*, 386 U.S. 738 (1967); *Entsminger* v. *Iowa*, 386 U.S. 748 (1967).

Entsminger clearly demonstrates the importance of preserving and filing a full trial record for purposes of appeal. According to Iowa practice, appeal could be made either on a "clerk's transcript" or a plenary review. The essential difference between the two forms was that the plenary review included a transcript and the briefs and arguments of counsel, while the "clerk's transcript" did not. In *Entsminger* the court-appointed attorney, by what this Court characterized as his "bare election", failed to perfect a plenary review, and it held that the petitioner was deprived of "all hope of any [adequate and effective] appeal at all" and was thereby denied due process and the equal protection of the law in violation of the Fourteenth Amendment. 386 U.S. at 752.

This Court's decision in *Entsminger* has not been followed by the Ohio courts in the principal case. If petitioner in *Entsminger* was denied "all hope of any [adequate and effective] appeal at all" by the failure of his court-appointed counsel to request a plenary review, what hope of an adequate and effective appeal did the petitioner here have once his assigned attorney failed to request the pres-

---

1968); *Smotherman* v. *Beto*, 276 F. Supp. 579 (N.D. Tex. 1967). In particular, the failure of appointed counsel to request the presence of a court stenographer has been considered a significant element in a charge of ineffective representation. *Hillman* v. *State*, 234 Ind. 27, 123 N.E.2d 180, 181-182 (1954); see also *Matherne* v. *United States*, 391 F.2d 449 (5th Cir. 1968); Note, Effective Assistance of Counsel for the Indigent Defendant, *supra* at 1447; *but see, Carden* v. *Henderson*, 284 F. Supp. 1009 (E.D. Tenn. 1967).

ence of a reporter at trial? Here, as in *Entsminger,* the absence of a court stenographer was on the "bare election" of the state court-appointed counsel; here, as in *Entsminger,* there was no notice to his client that he would not request a reporter; and here, but not in *Entsminger,* because of the court-appointed attorney's perfunctory defense, there is no transcript available and no possibility of an adequate and effective appeal. "The most astute of counsel [in an appeal] cannot demonstrate error from a record which exists only in a court reporter's stenographic notes." *State* v. *Ratliff,* 20 Ohio App.2d 20, 26 (1969). What, we might well ask, could an appellate lawyer have demonstrated when no record whatsoever existed in the principal case because the court-appointed trial counsel chose not to request the presence of a stenographer?

In this case petitioner's court-appointed attorney later admitted that he ordered a reporter only when he thought he had a "good chance of winning the case." What import can be given to his explanation other than that he thought that his client was guilty, or that the evidence of guilt was persuasive, and therefore that he neglected to ask for a court stenographer to transcribe the proceedings at trial. By prejudgment, by acting as though the petitioner were guilty and the case a lost cause, he failed to perform his most basic function—to represent his client. He assessed the chances of winning the case, decided that they were minimal, and in effect abandoned the petitioner before the beginning of his trial. Certainly this is not the adequate representation demanded by the due process clause of the Fourteenth Amendment.

We submit, therefore, that the failure of petitioner's court-appointed attorney to request the presence of a reporter and his consequent failure to preserve the trial

record raises substantial constitutional issues, requiring this Court to reaffirm existing principles and define the nature of counsel's responsibilities.

II.

The petitioner was deprived of his right to effective representation in violation of the Sixth and Fourteenth Amendments by the failure of his court-appointed attorney to inform him of his right to assigned counsel for purposes of appeal as of right.

In *Douglas* v. *California,* 372 U.S. 353 (1963), this Court held that an indigent defendant was entitled under the Fourteenth Amendment to the appointment of counsel to perfect an appeal as of right. Petitioner's trial was conducted two months after *Douglas* was decided and yet because his attorney failed to inform him of his right to appeal as an indigent, that right was forfeited.

Under Section 2953.05 of the Ohio Revised Code, petitioner had thirty days after sentence and judgment to perfect an appeal as of right. Nevertheless, although time was of the essence, petitioner's court-appointed attorney made no attempt to contact him further by letter or personal interview. He did not or at least he does not remember whether he or the trial court judge informed the petitioner of a right to a court-assigned attorney for purposes of appeal.

While *Douglas* v. *California* has secured the rights to a full appeal to the indigent defendant who specifically requests counsel, or who otherwise manifests his desire to appeal, see *Swenson* v. *Bosler,* 386 U.S. 258 (1967), it has not afforded relief to that class of indigent defendants

most in need—those who do not know at all that they have such rights and accordingly make no effort to exercise them. Increasingly, courts have held that in order to insure this right, the indigent defendant must be informed of it.

Thus, in *Nelson* v. *Peyton*, 415 F.2d 1154 (4th Cir. 1969), which is almost identical to the instant case, defendant was never informed of his right to appeal or to have a transcript for appeal, and consequently he never requested an appeal. Noting that the result would be the same whether the issue was viewed in terms of the right to counsel, due process, or equal protection, the Fourth Circuit concluded that the defendant's right to counsel had been denied:

> And where the states, which are not under the obligation to provide for appellate review, do provide for appellate review, his right to counsel continues through that stage of the proceedings and he must be afforded full resort to that review and to the documents and tools of appellate review, the same as if he were not indigent. 415 F.2d at 1157.

In *United States ex rel. Smith* v. *McMann*, —— F.2d —— (1969) (en banc), the Second Circuit recently took a slightly different approach to the issue, but reached the same result. It held the duty to inform to be that of the State's:

> We think the only practical, logical and fair interpretation to be given to *Douglas* v. *California* is that it imposes upon the state a duty to warn every person convicted of a crime of his right to appeal and his right to prosecute his appeal without expense to him by counsel appointed by the state, if he is indigent. *The right to appeal at the expense of the state is mere illusion if the convicted indigent defendant does not*

know that such a right exists. And the one way to make sure that he does know is to tell him so. Slip opinion at 3621-22 (emphasis added).[6]

Here, no one undertook that responsibility, and petitioner's rights were surrendered, but not, we contend, irretrievably.

The issue of whether there is a responsibility to inform an indigent defendant of his right to appeal, decided affirmatively by at least the Second and Fourth Circuits, presents a substantial constitutional question for this Court to resolve.

III.

The petitioner was deprived of his right to effective representation in violation of the Sixth and Fourteenth Amendments by the combination of the failure of his court-appointed attorney to request that a stenographer be present to record the proceedings at trial, and the failure of said attorney to inform him of his right to assigned counsel for purposes of appeal as of right.

Considered independently, each of counsel's omissions deprived petitioner of his constitutional rights. In combination, the two failures compel the conclusion that counsel single-handedly deprived petitioner of his right to a full appeal.

Under Ohio law when a transcript of the trial proceedings is unavailable, it is possible for purpose of appeal to file

---

[6] Two Circuits have taken the contrary position indicating that there is no affirmative obligation on the State to inform the defendant of his right to appeal. See, *Worts* v. *Dutton,* 395 F.2d 341 (5th Cir. 1968); *Victor* v. *Lane,* 394 F.2d 268 (7th Cir. 1968).

a narrative bill of exceptions. *Spotswood* v. *Industrial Commission,* 17 Ohio L. Abs. 196 (Ct. App. 1934). But such a procedure requires the conferring of the defendant's attorney with the trial judge and with the state's counsel. By his failure to request that a reporter be present to transcribe the proceedings, appointed counsel deprived the petitioner of a full transcript of his trial. By his failure to inform his client of a right to assigned counsel for appellate purposes, he effectively deprived petitioner of a narrative bill of exceptions. By both he deprived his client of the full and adequate review to which Ohio law entitled him.

Section 2953.05 of the Ohio Revised Code provides further that after the thirty-day period when appeal can be taken as of right, "appeal may be taken only by leave of court to which the appeal is taken." But here too the derelictions of trial counsel precluded review by leave of court. The Ohio Supreme Court has ruled that where there are valid reasons for the failure to appeal as of right, i.e., defendant has not knowingly and intelligently waived his right to appellate counsel, a motion for leave to appeal should be allowed. *State* v. *Catlino,* 10 Ohio St.2d 183 (1967). Even now at this late date a delayed review might conceivably be granted in the principal case to redress any trial errors. But at this point in time appeal by leave of court would be futile. No transcript is available, no narrative bill of exceptions can be composed (the presiding judge at trial has since deceased), and no trial errors can be corrected.

In short, petitioner's court-appointed attorney foreclosed the two avenues of appeal under Ohio law. By failing to inform his client of his right to assigned counsel to secure a review of the conviction, he made it impossible to prosecute an appeal as of right or by leave of court. By failing to secure the services of a court stenographer to record the

trial proceedings, he made it difficult to pursue an appeal as of right and impossible to prepare and implement an appeal by leave of court.

We submit finally that the question of the constitutionality of a procedure by which a court-appointed counsel effectively vetoes his client's right of appeal is substantial.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
156 Fifth Avenue
New York, N. Y.

DAVID L. STERLING
1404 First National Bank Building
Cincinnati, Ohio

Attorneys for Petitioner

December, 1969

APPENDIX

Finding of Fact and Conclusions of Law

[Filed June 26, 1968]

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

CRIMINAL DIVISION

No. 82392

CARL REYNOLDS SHELTON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

In accordance with the provisions of Section 2953.21, Ohio Revised Code, the Court makes the following Finding of Fact and Conclusions of Law:

FINDING OF FACT

1. Defendant was indicted on March 29, 1963, for the offense of auto stealing.

2. Subsequent to the indictment, counsel was appointed for the defendant, and represented the defendant at the trial held on May 10, 1963. At this trial the defendant was found guilty as charged and sentenced to an indeterminate term in the Ohio Reformatory.

3. In September of 1966 the defendant filed a Petition to Vacate in the Court of Common Pleas of Hamilton County, Ohio, and this Petition was denied on September 28, 1966.

4. On January 19, 1967, the Court of Appeals for the First Appellate District of Ohio denied the petitioner leave to appeal the Common Pleas Court denial of the Petition to Vacate.

5. On October 16, 1967, while represented by counsel, the petitioner filed a successive Petition to Vacate in the Court of Common Pleas of Hamilton County, Ohio. Hearing was held on this second Petition on December 28, 1967. The petitioner was represented by counsel and was present in court and testified. Subsequently counsel for petitioner and the respondent submitted a Stipulation of Facts to the Court.

CONCLUSIONS OF LAW

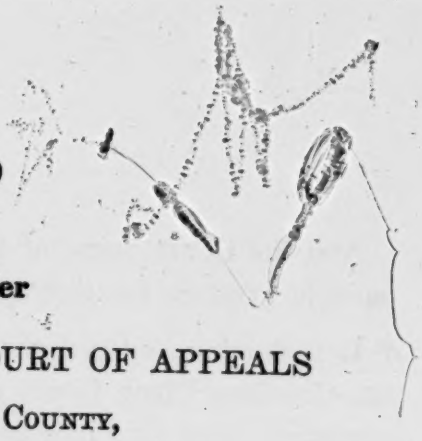
The evidence presented at the hearing on the Petition to Vacate, and the files and records of the cause, show that the petitioner was not deprived of his right to effective counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, as alleged in the Petition.

To all of which the defendant excepts.

ENTER

MORRISSEY, J.
Defendant excepts
DAVID L. STERLING
Atty. for the Defendant

ROBERT K. SACHS
Asst. Pros. Atty.



Order

FIRST DISTRICT COURT OF APPEALS

HAMILTON COUNTY,
OHIO

No. 10641

STATE OF OHIO,

Plaintiff-Appellee,

—VS.—

CARL REYNOLDS SHELTON,

Defendant-Appellant.

JUDGMENT OF AFFIRMANCE

This cause came on for hearing upon the appeal on questions of law, assignments of error, and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof, the Court finds there is no error apparent on the record in said proceedings and judgment, prejudicial to Appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same hereby is, affirmed, and that Appellee recover from the Appellant, his costs herein expended, taxed at $.....

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment. To all of which Appellant, by his counsel, excepts.

Judgment

THE SUPREME COURT OF THE STATE OF OHIO

1969 TERM

THE STATE OF OHIO,
CITY OF COLUMBUS. To wit: October 1, 1969

No. 69-338

THE STATE OF OHIO,

Plaintiff-Appellee,

—VS.—

CARL REYNOLDS SHELTON,

Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to

the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19 .....

..... *Clerk*

..... *Deputy*